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In the Supreme Court of the United States

TERM 19

No. 941

NEBRASKA NATIONAL HOTEL COMPANY, A Nebraska Corporation,

Petitioner,

v.

GEORGE W. O'MALLEY, Collector of Internal Revenue,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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JURISDICTIONAL STATEMENT

1. Judicial Code Sec. 240(a) as amended, being Sec. 347(a), Title 28 U. S. C.; Judicial Code Sec. 350, being Sec. 376, Title 28 U. S. C.; and Supreme Court Rule 39 are the statutory authority and court rule authorizing the allowance of this petition for writ of certiorari, before judgment in the Circuit Court of Appeals for the Eighth Circuit.

2. These sections are copied by petitioner with the pertinent parts italicized:

Title 28 U. S. C. 359—"Sec. 347. (Judicial Code, Section 240, amended.) **Certiorari to circuit courts of appeals and Court of Appeals of District of Columbia; appeal or writ of error to Supreme Court from circuit courts of appeals in certain cases; other reviews not allowed.** (a) *In any case, civil* or criminal, in a *circuit court of appeals,* or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, *either before or after a judgment or decree by such lower court,* that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal."

Title 28 U. S. C. 376—"Sec. 350. **Time for making application for writ of error, appeal, or certiorari; stay pending application for certiorari.** * * * *Where an application for a writ of certiorari is made* with the purpose of securing a removal of the case to the Supreme Court from a circuit court of appeals or the Court of Appeals of the District of Columbia *before the court wherein the same is pending has given a judgment or decree the application may be made at any time prior to the hearing and submission in that court.* * * * " 43 Stat. 940.

Rules of the Supreme Court—"**Rule 39. Certiorari to a circuit court of appeals or the United States**

Court of Appeals for the District of Columbia before judgment. Proceedings *to bring up to this court on writ of certiorari a case pending in a circuit court of appeals* or the United States Court of Appeals for the District of Columbia, *before judgment is given in such court*, should conform, as near as may be, to the provisions of Rule 38; and similar reasons for granting or refusing the application will be applied. That the public interest will be promoted by prompt settlement in this court of the questions involved may constitute a sufficient reason.

"Derived from 1928 revised rule 39, which was from 1925 revised rule 36."

3. *Carter v. Carter Coal Co.* and three similar cases, 298 U. S. 238, 56 S. Ct. 855.

4. The Supreme Court of the United States has given full effect to grant writ to successful party below. *Norman v. B. & O. R. Co., U. S. v. Bankers' Trust Co.* (1935), 294 U. S. 240, 55 S. Ct. 407.

5. Remarks of Mr. Chief Justice Hughes in reference to the last cited case on March 25, 1935, before Senate Judiciary Committee on S. 2176:

"Another feature of that case was that the government was the successful party below, and although it was the successful party below, the court recognized the propriety of the application for certiorari which the court granted."

STATEMENT OF THE CASE

I.

Nature of the Case

This cause proceeded by stipulation as a non-jury case (R. 25) in the United States District Court for the District of Nebraska, Omaha Division, before the Honorable James A. Donohoe, United States District Judge. The court's powers were invoked to decide the federal questions of importance: *Who, if anyone, is required by law to pay the employer's one-half of the 2% on the employees' wages for social security benefits? Who, if anyone is required by law to pay all the 3% on the employees' wages for unemployment benefits under Secs.* 1426 (b) *and* 1607 (c) *respectively of the Internal Revenue Code and Treasury Regulations* 106 *and* 107, *Secs.* 402.204 *and* 403.204 (R. 174-7)? *The services in question were performances by professional musicians who held themselves out to the public for hire and were so hired for stated engagements for a stated sum of money paid by the petitioner hotel.* Certiorari was allowed on January 6, 1947, to the same Circuit Court in cases No. 731 and 732, October term 1946. The same statutes to be construed under the same circumstances are involved in the case at bar wherein certiorari is prayed.

II.

The Decision Below

The trial court held that professional musicians were independent contractors; that as a matter of law, be-

cause of their professional status, they were classified as non-covered persons; that such professional musicians were in the same non-covered classification as other professionals who held themselves out to the public for hire; that written contracts for hire which designated the petitioner hotel as the employer and the professional musician as employee failed as a matter of law to change the legal result of independent contractor; that the statutes involved, adopted for the public welfare, became a part of such contracts of hire and were paramount to any conflicting contractual provisions between the parties; that a contract to shift or change the burdens and benefits of the public welfare statutes to suit the contracting parties is null and void in that particular; that professional musicians who hold themselves out for hire remain independent contractors and freed from the burdens and benefits of the acts in question; that the musicians refused to perform the professional services but for the contract defining the engager as employer and defining the musicians as employees to gain and affix the burden and benefits of the acts. (Opinion, R. 26; findings of fact and conclusions of law, R. 38; judgment for plaintiff and petitioner, November 13, 1945, R. 44; notice of appeal by respondent herein, R. 46; points relied upon by respondent for reversal, R. 326-7.) Opinion only is reported in 63 F. Supp. 26.

III.

Present Status of the Case

1. The petitioner for the writ of certiorari herein was the plaintiff in the trial court. It was the success-

ful party. The respondent herein was the defendant in the trial court. He was and is the Collector of Internal Revenue for Nebraska. He appealed from the trial court's judgment to the United States Circuit Court of Appeals for the Eighth Circuit. Thus the Government of the United States, acting through the Commissioner of Internal Revenue, may be considered as the real appellant in the United States Circuit Court of Appeals for the Eighth Circuit.

2. On January 6, 1947, the case was to be heard and submitted to the United States Circuit Court of Appeals for the Eighth Circuit. On that same day certiorari was allowed to that court in cases Nos. 731 and 732 covering the same questions. On December 18, 1946, the petitioner herein, who was appellee in the said United States Circuit Court, filed an application in that court for a stay of proceedings for thirty days to enable the petitioner herein to file a petition for writ of certiorari in the Supreme Court of the United States. Upon hearing, the Circuit Court granted the stay and entered an order accordingly on December 23, 1946.

3. The statement of points upon which the appellant-collector will rely on appeal (R. 326-7) was filed in the United States Circuit Court of Appeals for the Eighth Circuit on August 28, 1946, together with stipulation for printing the record (R. 327), and the same subsequently was printed and duly filed with the Clerk of said Circuit Court. This record is now certified and requisite copies filed with the Clerk of this Court. The contents of the record will be referred to herein as "R. ....."

IV.

Summary of the Contents of the Printed and Certified Circuit Court of Appeals Record

1. Title: Nebraska National Hotel Company (plaintiff in the trial court and appellee in the United States Circuit Court of Appeals for the Eighth Circuit and petitioner in this Court), v. George W. O'Malley (Collector for Nebraska). Opinion only reported in 63 F. Supp. 26.

2. Opinion, R. 26-38.

3. Findings of fact and conclusions of law, R. 38-44.

4. Judgment in favor of petitioner herein, entered November 13, 1945, by United States District Judge James A. Donohoe, R. 44-5.

5. Notice of appeal by respondent Collector, February 8, 1946, R. 46-7.

6. Points relied upon for reversal by respondent Collector, R. 326-7.

7. The complaint in the trial court, R. 1-18, with Commissioner's letter attached stating that musicians were employees of petitioner hotel because the signed Form A and Form B contracts so stated.

8. Answer in the trial court, R. 22-5.

9. Petitioner's letters to Commissioner of Internal Revenue protesting the classification of hotels as employer of professional musicians, R. 123-9.

10. Exhibit 16, summary showing thirty contracts and several hundred different musicians involved in the

case at bar during the period of 1940, 1941, 1942, and 1943. R. 119.

11. Regulations 106 and 107 of Treasury Department defining professionals who follow an independent profession and who hold themselves out for hire. Professionals are excluded from benefits and burdens of Secs. 1426(b) and 1607(c), Internal Revenue Code. R. 174-7.

12. Nebraska state laws and federal statutes passed in pursuance thereof concerning employment; assessment; collection; payment; necessity that performance control vest in employer; exemption of professionals from the acts; etc. R. 178-96.

13. State laws; the merit system. R. 194-6.

14. Testimony of state enforcement officials explaining the practical operations of the unemployment statute on musicians who hold themselves out for public engagements. R. 151 and 159.

15. Testimony showing engagers entitled to tax reduction by preventing unemployment. R. 323, Qs. 1001 to 1022.

16. Expert testimony explaining that a musician who holds himself out for hire as such is a professional and cannot be under the "control" of anyone else but himself performing alone (R. 81) or performing in harmony with others (R. 171, Q. 486).

17. Congressional hearings when an amendment to the statutes and regulations in question was submitted in 1939 by American Federation of Musicians and the proposed amendment. R. 200, 205; 244-50.

18. President Franklin D. Roosevelt's proclamation in 1939 cautioning against attempting to apply the social security and unemployment acts on too ambitious a scale. R. 197, 199, last par.

19. Letter from president of American Federation of Musicians urging that the congressional committee recommend the changing of the law in 1939 because the orchestra leader occupied the same relative position in performance as do the musicians and that the engaging establishment should be responsible for the tax on all as employer, R. 201-5.

20. The written statement of General Samuel T. Ansell as general counsel for the American Federation of Musicians at the hearing before the Committee on Ways and Means of the House of Representatives, 76th Congress, relative to amendments of 1939 (R. 205-44). The proposed amendment to include the musicians was defeated in Congress.

21. The statement of General Samuel T. Ansell of Washington, D. C., representing the American Federation of Musicians, orally made before the Committee on Finance of the United States Senate of the 76th Congress, H. R. 6635 (1939). He represented 140,000 members who earned their living by playing commercial music "for hotels, cafes, clubs, radio and like entertainment." R. 244-50. The proposed amendment that was defeated in 1939 is as follows:

> "That any person who for remuneration plays instrumental music or otherwise performs in or with an orchestra or other group of musicians, including

the leader thereof, shall be deemed the employee of the purchaser as such term is used in the ruling of the Commissioner of Internal Revenue dated August 31, 1937." R. 249.

22. The record, in part, in the case of *Griff Williams v. United States*, 38 F. Supp. 536. In that case by the findings of fact of the United States District Court, the hotel was held liable and the orchestra leader was exonerated from the taxes. The trial court therein held that some twenty facts governed the relationship between the musicians and the hotel (R. 264-66) and that these facts resulted in the musicians being the employees of the hotel instead of the orchestra leader. The decision in that case was reversed by the United States Circuit Court of Appeals for the Seventh Circuit, and the hotel was determined to be the contracting party with the leader as independent contractor.

23. Record in the United States Circuit Court of Appeals for the Seventh Circuit in the said case of *Williams v. United States*, 126 F. 2d 129. This record reveals that the statement of points urged by the government in its attempt to reverse the United States District Court in that case (R. 267-9) and the statement of points relied upon by the government in the case at bar (R. 326-7), are in direct conflict with each other, under the same state of facts and the same federal statutes and the same classification of citizens for the same professional service.

24. Constitution and By-Laws of the American Federation of Musicians attached as an appendix to the opin-

ion of the trial judge in the case at bar (R. 35-8). These prove that the responsibility and ultimate control of all musicians as members of the American Federation of Musicians rest with their union in all matters except that, obviously, the talent of the individual musician expressed in his own method of rendition makes him independent of control in that regard.

25. Letters between musicians and booking agencies and prospective engagers showing the method by which the professional musician herein holds himself out to the public for hire, how he is hired, and how he obtains his engagements. R. 61-6, 84, 85-91, 95.

26. All the testimony of the witness Pat Miller, manager of the petitioner hotel (R. 56; rebuttal, R. 315).

27. All the testimony of the expert witness Joseph Malec explaining the steps that must be taken by a musician to evolve to the rank of a professional for hire. R. 165.

28. All the testimony of the government's witness, Paul Moorhead (R. 269), as a typical professional musician and a band leader.

29. The contract of a single musician harpist, Louise Seidl (R. 81), being a Form B contract, showing no difference in its terms, whether made for one musician or many.

30. The mandate of James C. Petrillo, president of the American Federation of Musicians, on or about June 1, 1941, stating, "Members must refuse to play any engagements if the engagement is contracted on any other

form after May 31, 1941." The quotation refers to the Form B contract, the validity of which is in question (R. 284, Qs. 684-8).

31. Form B contracts (R. 11, 79, 81, 97, 111, 115, 289, 299, 307). By the terms of these contracts the Commissioner of Internal Revenue would affix the employer's tax upon all those who hired professional musicians when the musicians held themselves out to the public for hire. The respondent Commissioner based his directive upon the recital in the Form B contracts that "the employer shall at all times have complete control of the services which the employees will render * * *."

32. The Commissioner's directive letters. (R. 11-14, Nebraska; R. 305, 311-13 Utah; R. 295-7, Illinois.) The letters show the Commissioner's viewpoint, as expressed by him officially, that the contract controls the relationship irrespective of the professionalism involved.

33. Commissioner's ruling that by the terms of the previously used contract known as Form A and all similar contracts, the engager (hotel) became the employer (R. 11-14). However, the government counsel conceded at the trial (R. 29) in the case at bar that even though the hotels signed contracts as the employers of the musicians on Form A and similar contracts, the hotels were nevertheless not employers and not liable for the employer's taxes. The government did contend however, as the Commissioner's letters stated, that because of the Form B contracts, the hotels became the employers for tax purposes.

34. The trial court's holding that there was no difference in the law when applied to the two different contracts, Form A and Form B (R. 29, 33-5; 42-3).

35. Form A contracts. R. 15, 17, 69, 71, 73, 75, 77.

36. The trial court's ruling upon the concession of respondent-collector regarding Form A contracts (R. 29; 66-8) by this statement.

> "The defendant now concedes that the taxes levied on all contracts of the 'Form A' Class were erroneous and that the plaintiff is entitled to a refund of all of such items, but contends that by reason of the change in the contracts from 'Form A' to 'Form B,' and the specific language contained in 'Form B,' that the relationship of the Hotel Company to the musicians has changed to that of employer and employees, and hence the assessement of the taxes is valid."

37. The trial court's holding that there was no essential difference in the actual controls over professionals whether hired by either form of contract. R. 33-4-5; 42-3.

38. From the record it may be concluded: If the term "employer" used in all the Form A contracts failed as a matter of law to make the same hotel and the same musicians performing under the same conditions, employer and employees respectively under the statutes in question (R. 318-19, Qs. 938-45; R. 105, Qs. 57-79; R. 166, Qs. 441-5; R. 171, Qs. 486, 490-2), then the term "employer" in the Form B contracts should as a matter of law be likewise so construed because the word "employer" includes, if he be actually an employer, the right

to "at all times have complete control of the services which the employees will render * * *."

REASONS ADVANCED FOR THE ALLOWANCE OF THE PETITION FOR THE WRIT OF CERTIORARI BEFORE THE JUDGMENT OF THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIICUIT.

I.

New Questions in the Case at Bar Essential When Reviewing Cases No. 731 and 732, October Term, 1946.

1. The reasons advanced in the case at bar for presentation at this time of this petition for writ of certiorari to the United States Supreme Court before the submission and hearing and judgment in the case by the United States Circuit Court of Appeals for the Eighth Circuit where it had been lodged by respondent, are:

2. On January 6, 1947, the United States Supreme Court allowed a petition for writs of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit in two combined cases wherein that same Circuit Court had given its final decision. These cases are entitled Roy Bartels, Ed Bartels, Carl Bartels and Justin Conlon, d/b/a Crystal Ballroom v. E. H. Birmingham, individually and as Collector of Internal Revenue for the State of Iowa, and Griff Williams, Bill Carlsen, Tiny Hill, Boyd Raeburn, Buddy Fisher and Paul Moorhead, Interveners, No. 731, October term 1946; and Larry V. Geer and Margaret Geer, d/b/a Larry Geer Ballrooms

v. E. H. Birmingham, individually and as Collector of Internal Revenue for the State of Iowa, No. 732, October term 1946. The petition for those writs (now granted) was filed with the Clerk of this Court on November 29, 1946. The petitioners in Nos. 731 and 732 were appellees in the same Circuit Court of Appeals as in the case at bar, and they were the successful parties before the United States District Court at Des Moines, Iowa (59 F. Supp. 84). The United States Circuit Court of Appeals for the Eighth Circuit in those cases, after submission by the parties (including brief and argument by interveners who were leading musicians, represented by Mr. James A. Padway, counsel for the American Federation of Musicians), reversed the United States District Court and entered its opinion on September 25, 1946 (157 F. 2d 295). Circuit Judges Woodrough and Johnsen rendered the majority opinion and Circuit Judge Gardner dissented.

3. The question presented to and decided by the United States Circuit Court of Appeals in the said cases No. 731 and 732, October term 1946, now before this Court, is whether or not a written contract (Form B) between the leader of the musicians (orchestra leader) and the engagers of the musicians (ballroom operators) created the status of employer and employee under the same federal excise tax statutes that are in question in the case at bar. By such contract the government seeks to hold the engagers of the musicians liable for the social security and unemployment taxes under Secs. 1426(b) and 1607(c) of the Internal Revenue Code. The American Federation of Musicians seeks to exonerate

the leader from the tax, as will be seen from the petition of intervention in those cases. Petitioner in the case at bar presents points of law that would exonerate the engager primarily, but likewise the leader. This position will develop as petitioner proceeds.

4. The actual employment relationship between musicians and their engagers under like circumstances as shown in said cases No. 731 and 732, October term 1946, had been held by the other circuit courts to be other than that of employer and employee. The trial court in said cases No. 731 and 732 likewise so held. Thus, but for the contract Form B, the tax would be inapplicable to the ballroom and similar hotel operators. In cases No. 731 and 732 the trial court, by applying the various tests customarily used to determine the master and the servant, held the ballroom operators free from the employer's tax. The orchestra leaders, by the same tests, were held to be independent contractors and the employers of the "sidemen" as employees. This decision, as above stated, was reversed by the Circuit Court of Appeals for the Eighth Circuit, and certiorari has now been allowed in those cases by the United States Supreme Court.

5. The same legal question is involved in the case at bar, but two other basic legal reasons and decisions were given by the trial court for the same result. These should be considered by this High Court in its review of any decisions involving professional musicians under these acts, and especially cases No. 731 and 732.

6. The record in the case at bar, as shown from the summary of the record above, should sustain the trial court in the case from Omaha, Nebraska, in each of the following:

(a) that all professional musicians who hold themselves out to the public for hire and are so hired are in the same non-covered classification under the statutes as all other professional persons so offering various talents, because of their professional status for hire.

(b) that the intended operation of the statutes may not be changed by contract between individual citizens to suit their convenience, and may not be altered in the matter of obligations imposed by the statutes as a condition for the performance of the contract or the rendition of the professional services.

(c) that the public welfare laws in question become a part of all contracts and agreements between citizens in reference thereto, and conflicting provisions of all contracts must give way to the paramount provisions of the statutes.

7. Consequently, the petitioner herein submits that these decisions and others deduced from the trial court's findings of fact and conclusions of law (R. 38) should be reviewed by the allowance of this petition at this time, in order that these questions of public concern, based upon the same federal excise tax statutes, may be presented as a companion case with cases No. 731 and 732, October term 1946, which are now for review before the United States Supreme Court.

II.

Conflict in the Decisions of the Federal Courts.

1. There is a direct conflict on main issues in the decision of the Eighth Circuit and the Seventh Circuit because recently the Eighth Circuit decided in the Des Moines cases (September 25, 1946), 157 F. 2d 295, contrary to the Seventh Circuit's decision in *Williams v. U. S.* (February 27, 1942), 126 F. 2d 129. The latter case reversed the District Court of the United States for the Northern District of Illinois, Eastern Division, Charles Edgar Woodward, Judge, reported in 38 F. Supp. 536 (May 2, 1941), which reversed case is in keeping with the Eighth Circuit's present position on these questions. The employer's contribution tax was not collected by the Collectors of Internal Revenue from the hotel engagers of musicians after the final decision of the Circuit Court in the *Williams* case, supra, until the nationwide ruling was made by the Commissioner directing all collectors to enforce all contracts Form A and Form B, which named the hotel as employer of the musicians, and all the musicians as employees, including the leader.

2. On and after June 1, 1941, James C. Petrillo, as president of the American Federation of Musicians (R. 284, Qs. 684-8), required all musicians throughout the nation to play no music unless the engager signed a certain contract Form B. This Form B contract by its recitals defined the engagers of the musicians as employers and the professional musicians, who held themselves out for hire, as employees. In the contract were

the words that vested all control over the individual musicians in the engaging establishment.

3. The late opinion of the Eighth Circuit upholding the Petrillo contract is in conflict on main issues with the reasoning in *Radio City Music Hall Corp. v. U. S.* (2 C. C. A., decided May 3, 1943), 135 F. 2d 715, 717 (R. 32).

4. The Petrillo contract decision is likewise in conflict as to practical results with the opinion of the Supreme Court of Nebraska in *Hill Hotel Co. v. Kinney* (1940), 138 Neb. 760, 295 N. W. 397, wherein under all similar circumstances of engagement, except that no contracts Form B were executed, the professional musicians who held themselves out for hire were held by the highest court in Nebraska to be independent contractors and thus in a non-covered occupation under the acts and regulations here in question. (R. 174-7, Regulations in full. In force at all times since 1937.)

5. The Petrillo contract decision in the Eighth Circuit is in conflict with the Supreme Court of Wyoming in *Unemployment Compensation Comm. v. Mathews,* 56 Wyo. 479, 111 P. 2d 111, wherein professional musicians were classified as independent contractors and in a non-covered class by virtue of their professionalism.

6. Therefore, it seemed to be a useless attempt to justify the soundness of the trial court's decision in the case at bar before the United States Circuit Court of Appeals for the Eighth Circuit because of its decision in the Bartels cases, No. 731 and 732, October term 1946,

now pending before the Supreme Court of the United States for review on certiorari.

7. This High Court is offered, in the interest of a vast group of affected citizens, very extensive research and study, exemplified by the trial court decision in the case at bar.

III.

Conflict in the Decisions of State and Federal Courts.

1. As a further reason for the allowance of the writ, petitioner submits that the state officials for enforcement of the unemployment assessments and granting of unemployment compensation are entitled to uniformity in the federal court decisions and the Commissioner's ruling in reference to professional musicians who hold themselves out to the public for hire. (Law requires such uniformity, R. 178.)

2. The state laws become highly important because the social security act in reference to unemployment is administered entirely through the state agency. The record in the case at bar sets forth the pertinent state laws and state regulations and the enabling federal statutes (plaintiff's ex. 21, R. 178-87; plaintiff's ex. 22, Nebraska state laws passed in pursuance of the foregoing federal statute, R. 187-94; plaintiff's ex. 23, Rules and Regulations adopted in conformance with the Nebraska Placement and Unemployment Insurance Laws, R. 194-6).

3. Note the "Disqualification" (R. 188) and the "Waiver of Rights Void" (R. 193) and the clear exemption of professionals (R. 187c) under state law.

4. Also in the record in the case at bar the officers of the state in charge of unemployment under the act gave their testimony at the trial (R. 151, 159) to explain the modus operandi of the acts in question.

5. The conclusion drawn from the record as cited seems convincing that the United States Circuit Court of Appeals for the Eighth Circuit failed to consider the effect of the state conformity act and the application of the state laws on the subject passed pursuant to the federal laws.

IV.

Reasons for Exclusion of Professionals from the Acts in Question.

1. In the event certiorari is allowed, the petitioner, as a typical representative of engagers of professional musicians throughout the United States (petitioner pays musicians $40,000 per year, R. 59, Q. 26), will attempt to effectively establish before this High Court the fundamental principles underlying the refusal by Congress to grant the amendment to the social security and unemployment statutes requested of Congress by the American Federation of Musicians in 1939. Petitioner will also attempt to establish the fundamental principles underlying the refusal by the Treasury Department to alter its rules and regulations (R. 174-7; 178-96) to include within the acts professionals who hold themselves out to the pub-

lic for hire. These congressional hearings, data submitted by the American Federation of Musicians and its president and general counsel, are in the record in the case at bar and were presented to the trial judge and received in evidence (R. 197-249; amendment proposed, R. 249).

2. The foregoing citations to the federal and state laws show that the 3% tax levied upon the employer is to prevent unemployment. The tax may be reduced by an actual employer, by his own good management, to one-half of 1%. If the employer so controls the work of his own employees to eliminate unemployment within his own establishment, the tax is automatically reduced (R. 194-6). To accomplish this result the employer must have very little unemployment among his own employees. The money paid by the petitioner as employer is carried in a special fund similar to a bank account of that particular individual employer (R. 192; 194-6; 151-60). It is not combined with some other employer's account in Nebraska. Many states have similar laws or pooling laws for the funds. At present the law provides that the tax shall be 3% upon the wages of each employer's employees. It increases in 1948. The employee pays no part of the 3% for unemployment emergencies. All the tax is kept on deposit by the federal government for Nebraska for unemployed persons who qualify as employees (R. 192-6).

3. If, after the period of January 1941, including the then balance on hand (7.5% of his employment pay roll for regular employees), the employer's account indicates by the ratio figures that he has had little unemployment

and therefore few withdrawals from his unemployment fund, the tax may be reduced to as low as one-half of 1% (R. 195-6). That reduction constitutes a large saving where the pay rolls are extensive. It is guaranteed by law if the employer does his part to prevent unemployment of his own employees. The total fund to the credit of Nebraska at the time of the trial in 1945 was about $21,000,000 for all employees who were actually employees (R. 160, Q. 419; R. 152-3). No others but actual employees may draw upon that fund, should they become unemployed.

4. There is an overhead fixed amount of the unemployment tax of three-tenths of 1% that must be paid in any event (R. 158, Qs. 398-403). That amount provides a fund for general administration for state expense. The remaining tax of 2.7% applies on the amount of money that the employer pays out on the wages of his employees and which makes up the total fund to the credit of each individual employer.

5. This 2.7% may be reduced to one-half of 1% as above stated, if the particular employer does conduct his employment relationship with his own employees in such manner that the employer himself will create a condition of minimum unemployment in his business. Thus there will be no withdrawals for unemployment against his particular fund, and his taxes will thus be reduced greatly. The unstable, inconsiderate employer with a large unnecessary "turnover" of his employees must pay the full "penalty."

6. The petitioner will present to this Court, in the event that certiorari is allowed, a very considerable new phase underlying the enactment of the unemployment laws and the congressional adherence to them as enacted. It will do so from the record in the case at bar.

7. Petitioner will present for this Court's consideration the fact and law that all professional persons who hold themselves out to the public for hire and are under contract for a stated sum, for stated engagements, for stated hours, and for stated professional services, are excluded from the benefits of the acts as a non-covered class, because none of the elements of real employer and employee relationship are present by which the engager may control unemployment and reduce his taxes.

8. The musicians are peculiarly within the non-covered classification. The employer could not discharge a certain number of men in an orchestra or band or transfer them to some other department in his business for other work. Nor could he arrange for their employment as musicians or in some other line by some other hotel that needed men to do various other types of work. Such procedure cannot take place with professionals. It does not fit in with the modus operandi of the unemployment tax act and the procedure for receipt of benefits or its administration (R. 188-94). It is beyond the scope of the employer's ability or his work to learn the disqualifications elsewhere of musicians and entertainers who played an engagement in his establishment and then moved on to fill other engagements. The thirty engagements shown in this record are for one week or for two weeks or for six months or more

(Ex. 16. R. 119), with the privilege always of cancellation of the entertainment by either party.

9. In one instance in the case at bar the witness for the government, an orchestra leader, stated that even though he was under contract for certain hours for the petitioner, he was always holding himself out for hire. The entire orchestra had filled other engagements in an adjoining city (R. 283, Qs. 645, 653). In the afternoons outside the hours of the engagement for the petitioner, one orchestra in question performed services over the radio as professional musicians who held themselves out to the public for hire (R. 282, Q. 632-41). This holding themselves out for hire is customary practice with profesional entertaining musicians, and properly so. They have no employer to contend with. The particular engagement for which they are retained may be cancelled upon notice. The witness for the government stated that the petitioner had nothing whatever to do with fixing the scale of wages (R. 279). This unemployment control is lacking in that feature. Also the government witness stated that if anything went wrong in the orchestra that might not be apparent to any observer or listener, the manager of the hotel would be unable to detect it nor would he know what to listen for (R. 285-6, Qs. 895-914) or how to make the correction. These reasons for professionals being a non-covered class, may be developed more fully from the record in the case at bar.

10. When the question was asked the government witness in reference to the controlling of the means and methods of the performance of the professional services

of musicians by the manager of the petitioner's hotel, he stated that the hotel manager's direction of selecting a person for the orchestra would be as far-fetched as if the musician witness were asked by the hotel management to represent the hotel in the trial of the pending case (R. 278, Qs. 580-1). This statement is illustrative of the inability of the engager of professionals to change them about as he does all other employees. He is unable to obtain other employment for them when unoccupied, or otherwise exercise individual control, over professionals to save the employer the statutory reductions of his employee taxes which the law insures.

V.

The Refusal of Congress to Amend the Acts.

1. In the event that certiorari is allowed, the petitioner will explain the legal effect of the musicians' appearance and amendment proposed before the congressional committees in 1939 (R. 200; 244; 249). The American Federation of Musicians contended that the orchestra leader is one of the professional musicians so far as his status as a musician is concerned and that he should be exonerated from the employer's tax. Congress made no changes in the law to make the musicians' leader the employer of the sidemen for unemployment tax purposes. Congress left the leader and the sidemen all as professionals and free from the employer's tax under both statutes. On this point the same position is now taken before this Court by Mr. Padway for the American Federation of Musicians in the companion cases No. 731

and 732, October term 1946 as shown by his brief as intervener in the trial court and Circuit Court of Appeals.

2. The position taken by the petitioner in the case at bar is in accord with the result sought by Mr. Padway for the orchestra leaders. Petitioner seeks no decision that would bind the orchestra or band leader to pay the employer's tax. Petitioner contends that the leader, as well as the musicians, is in the non-covered professional class under the law. The trial court so found and decided (R. 43, par. 9; R. 44, par. 4).

3. The Treasury Department (R. 211-14; 249. Reg. 90 and 91 (1936) are now 106 and 107, no change, R. 174-7) refused to alter its regulations in defining all professional persons who held themselves out to the public for hire as independent contractors and outside the benefits and burdens of the acts. No distinction was made between the leaders and musicians in the regulations. All musicians were treated as professionals and exempt. All are professionals. The pay of musicians is fixed by the union and paid by the hiring engager, not by the leader (R. 280, Qs. 601-6; example contracts, R. 115).

4. Thus the Court will be fully advised in the premises, if the petition for certiorari is allowed, that while the musicians desire the benefits of the act, they will not assume any of its burdens as employers. This position seems untenable. The musicians in question in the case at bar are all in the non-covered classification, including the leader of the band.

VI.

Necessity for Review by the Supreme Court of the United States in Cases No. 731 and 732, October Term 1946, with the Case at Bar.

1. The respondent collector seeks to reverse in the United States Circuit Court of Appeals the following pertinent parts of the decision of the trial court which applies to all professional musicians who hold themselves out to the public for hire. The trial court's decisions on these points should be made universal by a decision of the Supreme Court of the United States. Otherwise, engagers will be required to sign still other and different contracts imposing and shifting the tax burdens and benefits in more explicit language, with new tests and confusion in its interpretation and application.

2. The trial court in the case at bar stated in the opinion (R. 35):

> " • • • The provisions of the statutes and the pertinent regulations of the Treasury Department exempt from the provisions of these acts those persons who follow an independent trade, business or profession holding themselves out for hire, the result of which places them in the status of independent contractors.
>
> "We, therefore, conclude that the musicians in the case at bar were at all times independent contractors while engaged by the plaintiff. Therefore, plaintiff is awarded judgment for all of the refunds prayed in its complaint."

3. The trial court stated in the findings of fact (R. 43):

"The musicians involved held themselves out for hire and followed an independent profession. They were especially talented and skilled in the rendition of music, individually and with others. In the pursuit of their profession as musicians and entertainers, their engagements, as shown by the large number of contracts in evidence, placed them in the classification of independent contractors at all times mentioned in the case at bar. These various musicians and entertainers, being professionals who held themselves out for hire subject to the terms of their contracts of engagement, are independent contractors."

4. The trial court stated in the conclusions of law (R. 44):

"The musicians were professionals who held themselves out to the public for hire, subject to the terms of their contracts of employment. They followed the profession of musicians and entertainers as an independent trade, business, or profession, and as a matter of law became independent contractors rather than employees of the plaintiff hotel by virtue thereof."

5. The court was fully justified in so deciding when Congress refused to amend the two statutes in question by rejecting the amendment proposed by the American Federation of Musicians heretofore quoted (R. 249) and again set forth:

(a) "That any person who for remuneration plays instrumental music or otherwise performs in or with an orchestra or other group of musicians, including the leader thereof, shall be deemed the employee of the purchaser as such term is used in the ruling of the Commissioner of Internal Revenue dated August 31, 1937."

Congress permitted the following regulations of the Treasury Department to stand (R. 174-7):

> (b) "If the relationship of employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial. Thus, if such relationship exists, it is of no consequence that the employee is designated as a partner, co-adventurer, agent, or independent contractor."

and also to stand unchanged the following regulation (R. 174-7):

> (c) "Generally, physicians, lawyers, dentists, veterinarians, contractors, subcontractors, public stenographers, auctioneers, and others who follow an independent trade, business, or profession, in which they offer their services to the public, are independent contractors and not employees."

6. Petitioner discovered nowhere in the digests and treatises of the law on this subject any decision in conflict with these findings and decisions in reference to professional musicians, save the Eighth Circuit Court's opinion in cases No. 731 and 732 (157 F. 2d 295) soon to be reached for review by this High Court.

7. Petitioner should be permitted to present the record and its briefs on final hearing when the High Court is considering cases No. 731 and 732. For that reason, certiorari should be granted herein. It is more important to the musicians and their engagers throughout the nation as well as the government, that these additional clear-cut points decided by the trial court in the case at bar be presented to the United States Supreme

Court when passing upon said cases No. 731 and 732, October term 1946, than that petitioner be denied certiorari and compelled to await decision on the questions as limited by the issues in said cases (157 F. 2d 295), or proceed in a Circuit Court that has already by precedent held contrary to petitioner's objective in the case at bar.

VII.

Legal Effect of the Government's Concession in Open Court on Form A Contracts (R. 29).

1. In a typical Form A contract (R. 73) the petitioner herein contracted that it would be the employer of the musicians and that the individual musicians would be its (petitioner's) employees. The leader signed as the representative for the employees. Nevertheless, the government conceded in open court that this contract imposed no liability upon the petitioner hotel for the employer's tax (R. 41, par. 4; R. 42, Par. 6; R. 43, par 2). In other words, the Form A contract was *nudum pactum*. Refunds were awarded by the trial court for the taxes paid under all Form A contracts (R. 27) under both the findings and conclusions of the trial court and the concession of the government.

2. In the typical Form B contract (R. 81) the words "employer" and "employee" appear the same as in the Form A contract, with the added words (discussed by trial court, R. 28), "The employer shall at all times have complete control of the services which the employees will render under the specifications of the contract."

3. Assuming for the purpose of clarification of an issue in the case that the contracts could create the employer and employee relationship between the professional musicians and their engagers under the circumstances herein shown by the record, then petitioner submits that there is a clear conflict between the Seventh and Eighth Circuits on the matter of contract because the wording of the two contracts gives the same legal result.

4. However, in the event that certiorari is allowed, the petitioner will seek to sustain before the Supreme Court of the United States the following legal proposition which was decided by the trial court:

> "The relationship of the parties may not be changed by contract as attempted in 'Form A' and particularly in 'Form B,' because the statutes and the regulations become a paramount part thereof in this type of legislation. Otherwise, the results to be attained by such legislation might be altered at will of the contracting parties." R. 43-4.

5. If petitioner is successful, then no such contracts could shift the tax, even though signed by the engagers as a condition for obtaining the professional services of the musicians, and even though signed and agreed without duress.

VIII.

Immateriality of Protest and Duress in an Action for Refund.

1. Certiorari should be allowed because the record shows that all professional musicians are members of

the American Federation of Musicians and all are governed by its constitution and by-laws (R. 35). One of the rules issued by its president, James C. Petrillo in June of 1941 was that no contract should be entered into by the musicians excepting Form B, by which the engager of the musicians must agree to be the employer and must agree that the orchestra members and leader are employees. Unless the contract is so signed and the burdens and benefits of the acts shifted, the musicians may not perform (R. 284, Q. 684; R. 122-129; R. 132, Q. 122).

2. As a matter of law these facts present questions of duress, and to what, if any, extent used by the American Federation of Musicians; also the degree of protest registered by the petitioner hotel with the Commissioner. Both these questions become immaterial under the Internal Revenue Code, Sec. 3772. In all suits for refunds in which the validity of the taxes is brought before the courts, protest and duress are immaterial to the issues. The United States Circuit Court of Appeals for the Eighth Circuit in its opinion in the Bartels cases, Nos. 731 and 732, October term 1946, stressed the lack of duress exercised by the musicians and their organization, and the freedom that left the engager the alternative of obtaining other musicians. The Circuit Court mentioned in effect that the parties dealt at arm's length when signing Form B, and therefore the contracts were valid and their terms must be carried out (157 F. 2d @ 302, para. 6 and 7).

3. However, in the case at bar, if certiorari is allowed, the petitioner will prove as a matter of law that

the question of duress, unfair advantage, and protest becomes immaterial to the issues because of the Internal Revenue Code, Sec. 3772(b) in reference to suits for refunds, which reads as follows:

> "Such suit or proceedings may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress."

4. Perhaps that statute means if duress were used by the collecting officer or the Commissioner of Internal Revenue to enforce the payment. The payment of the tax might be the result of the duress of those who would compel another to pay the taxes for them. However, the tax may be recovered in a suit for a refund against the Collector, irrespective of protest or duress. Therefore, the question of duress in the signing of the contract and the payment of the taxes under protest obviously become immaterial. As the Eighth Circuit, shown in cases No. 731 and 732, October term 1946, depended upon the freedom in the dealing of the parties to the Form B contract to arrive at its decision, the immateriality of that feature of the case should be presented to the United States Supreme Court when it considers the execution of the professional musicians' contracts of hire.

STATEMENT OF POINTS RELIED UPON TO SUSTAIN THE ALLOWANCE OF THE WRIT AND THE AFFIRMANCE OF THE OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA IN THE EVENT THE PETITION IS ALLOWED.

I.

Are not the social security and unemployment statutes applicable only to actual employers and employees, irrespective of recitals in the contracts of employment? (Secs. 1426(b) and 1607(c) of the Internal Revenue Code and Treasury Regulations 106 and 107, R. 174-7.)

II.

Are not musicians who hold themselves out to the public for hire as professionals in a non-covered classification by virtue of their professional status?

III.

May an appellate court rightfully disturb the findings of fact, conclusions of law, and judgment of a trial court in a non-jury case which held that musicians were professionals who held themselves out to the public for hire when there was evidence of record to establish the professional status of musicians and the obvious purpose of their hire?

IV.

Does not the interpretation by the courts of the word "employer" in all Form A contracts here in question under these acts become binding as a precedent in the interpretations of the same word used in the same way between the same classes of persons in the Form B contract?

V.

Were not the social security and unemployment statutes, Secs. 1426(b) and 1607(c) of the Internal Revenue Code passed in the interest of the public welfare? If so, then by reason thereof, do these laws make void as a matter of law the provisions in all contracts seeking to fix the relationship of the parties as employer and employee when, but for such provisions, such stated relationship would be non-existent?

VI.

Are not the courts bound to accept the legal result which arose from the rejection by Congress of an unambiguous amendment submitted by the musicians to include themselves as employee beneficiaries under the act in question? Is not the legal result the exclusion of all professional musicians and leaders, who hold themselves out to the public for hire, from employee benefits of the acts?

VII.

In the execution of contracts between professional musicians and their engagers which seeks to create the relationship of employer and employee, do not all questions of protest, or the lack of it, and the duress, or the lack of it, in the execution of the contract, become immaterial in an action for refund of the taxes paid?

VIII.

Is not the position of respondent in the case at bar in conflict with the laws and regulations of the state which were passed in reference to the unemployment statutes? When Congress has delegated the collection and enforcement provisions of the act to the states, should not the United States Supreme Court review a conflicting decision of a United States Circuit Court of Appeals which permitted by its decision professional musicians, including their leaders, to receive employee benefits after the highest court of the state had denied them the benefits? May the State-Federal decisions lack uniformity where Congress has passed State-Federal conformity laws directly applicable to the questions here involved?

IX.

Do not the issues and the record made in the case at bar differ from the issues and the record made in cases No. 731 and 732 now before this Court in the following points of importance to the public?

(a) When applying the points above set forth, once it is determined by the trial court that the claimed employees, including leaders, are professional musicians who held themselves out to the public for hire, the common-law test of master and servant to determine the employer and the employee must give way to the statutes and the regulations which specifically exclude professionals from the benefits of both acts.

(b) Based upon the congressional proceedings of record in the case at bar, all professional musicians have been specifically denied inclusion under the acts and regulations in suit.

(c) Contracts such as Forms A and B later adopted by professional musicians to include themselves by defining the conditions for work and pay and vesting control over them in their engagers, become inconsequential, as shown by the record evidence in the case at bar, because that record evidence contains the facts that form the base to define the professional by law. It shows conclusively the fact that the individuality of each musician and leader in the expression of his own personal professional talent precludes the possibility of control by anyone over his professional services in the method or manner of his performance.

PRAYER

Wherefore, the petitioner, Nebraska National Hotel Company, prays that the Supreme Court of the United States will allow this petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit in case No. 13359. By allowance of the petition, the writ will direct the clerk of said Circuit Court of Appeals to certify and deliver to the Clerk of the Supreme Court of the United States the printed record filed in that court; that the briefs of respondent as appellant now on file in that court may likewise be transferred to this Court as appellant's brief herein, if counsel for respondent so desires; that upon hearing, the judgment of the United States District Court for the District of Nebraska in this cause, being Nebraska National Hotel Company, a Nebraska corporation v. George W. O'Malley, Collector of Internal Revenue, be affirmed and adopted as the law governing this cause upon all the issues presented.

Petitioner prays that this cause may proceed for hearing with the companion cases No. 731 and 732, October Term 1946, wherein petition for writs of certiorari was allowed on January 6, 1947, to the United States Circuit Court of Appeals for the Eighth Circuit. Petitioner further prays for such other and further relief as may be just and equitable in the premises.

Dated January 18th, 1947.

Respectfully submitted,

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

A person who follows an independent profession, such as a professional musician, and who holds himself out to the public for hire, when so hired becomes as a matter of law a non-covered professional person under the social security and unemployment statutes and the rules and regulations of the Treasury Department. (No contracts to change the relationship are involved in the following decisions.)

Treasury Regulations 106 and 107, defining the employer and employee relationship, independent contractors, and professionals (R. 174-7).

Social Security Act, Secs. 804, 811(d), 907(c); 42 U. S. C. A. Secs. 1004, 1011(b), 1107(c); and 26 U. S. C. A. Internal Revenue Code, Secs. 1426(b) and 1607(c).

George W. O'Malley, Collector v. Nebraska National Hotel Co. (10/2/45), 63 F. Supp. 26. (Only opinion reported. Findings of Fact, R. 38. Conclusions of Law, R. 43. The affirmance of this decision of the trial court in this Court on this point is sought by the taxpayer.)

U. S. v. Aberdeen Aerie No. 24 (Wash. 2/16/45), 148 F. 2d 655. Ninth Circuit. Held physicians rendering professional services under an agreement to members of lodge were non-covered because professionals.

"There can be no comparison between the control exercised or capable of being exercised in that case and the case at bar where the physicians are engaged to perform services which they alone can

render because of their learning, their skill and their experience, the manner and method of execution of which the laymen of the Aerie could not attempt to supervise or control."

Aberdeen Aerie No. 24 *v. U. S.* (Wash. 7/9/43), 50 F. Supp. 734. No appeal from the decision that orchestra members and leader were in a non-covered class rather than covered employees as claimed by the musicians.

"An orchestra leader who contracted with fraternal organization to supply music for organization on certain occasions was an 'independent contractor,' and neither he nor members of his orchestra were 'employees' of organization for purpose of tax imposed under Social Security Act before 1939 amendment and Federal Insurance Contributions Act."

Vaughan v. Warner (Pa. 8/8/46, 3d cir.), 157 F. 2d 26. Under Pennsylvania compensation act vaudeville entertainers were held independent contractors. In the opinion the court cited with approval the case of an orchestra consisting of nine musicians who, because of their professional status, were denied compensation as employees.

"In the case of McCracken, Appellant, v. Slemmer et al., 112 Pa. Super. 135, 170 A. 453, The Golden Dragon Restaurant, Inc., entered into a contract with a person by the name of Art Coogan to furnish nine musicians at the restaurant for the purpose of entertainment. * * * ."?

"The Superior Court of the Commonwealth of Pennsylvania held that the contract of employment excluded the legal conception of the relationship of master and servant, viz., that a servant is one employed to render personal services to his employer, otherwise than in the pursuit of an independent calling, and in such service remains so entirely under

the control and direction of the employer that the latter has the right to select and discharge the servant and to direct both what work shall be done and the manner in which it shall be performed."

Also in reference to professionals the court stated:

"It has been argued that the defendants in these cases had control over the vaudeville actors or specialists for the reason that the theatre owner or the receivers had the right to delete objectionable features, and to vary the exhibitions to the extent of prescribing the duration and appropriate place in the program. It must be remembered furthermore that the theatre owner had no control over the manner of performance or the direction of the individual talents of the artists, and that the contract was not subject to cancellation."

Los Angeles Athletic Club v. U. S. (S. D. Cal. 2/5/44), 54 F. Supp. 702.

"Seldom, if ever, were written contracts entered into, and if a music agency secured the orchestra it regularly charged plaintiff a fee. Between January 1, 1936 and September 30, 1940, 103 orchestras, varying in size from 6 to 10 members, played for plaintiff on 868 occasions, and if not already existent at the time the agreements to play for plaintiff were made, orchestras were assembled for the events, respectively, by the various leaders from among musicians of their own acquaintance who were free to play at the specified time."

The court held that the relationship of employer and employee exists in none of the many instances of record. Judgment for all the refunds was granted to plaintiff for the amounts paid. An appeal to the United States Circuit Court for the Ninth Circuit was dismissed by the consent of the United States Government. 144 F. 2d 352.

Hill Hotel Co. v. Kinney, Comm. State Dept. of Labor 12/20/40), 138 Neb. 760, 295 N. W. 397.

General Samuel Ansell, the general counsel for A. F. M., appeared for the musicians.

> "Evidence that a hotel manager who engaged an orchestra leader to furnish music, directed the musicians when to play, when to stop, and cautioned them not to loiter around the place or disturb guests or employees of the hotel, does not evince such control over the musicians as to disprove the otherwise established relationship of independent contractor between the leader and the hotel."
>
> *In re Ten Eyck Co., Inc.* (D. C. N. D. N. Y., 9/17/41), 41 F. Supp. 375.
>
> "The conclusion therefore must be that the hotel was not the employer of the members of the orchestra and is not liable for the taxes sought to be collected by the Collector of this district."

Factual matters were actually alike then and now in reference to all professional musicians.

II.

Statutes enacted by Congress in the interest of the public welfare, although conferring rights on private citizens, may not be altered by such citizens to suit themselves.

None of the following cases pertain to the social security acts—only similar public welfare statutes are here considered.

> *Brooklyn Savings Bank v. O'Neill* (4/9/45), 324 U. S. 697, 65 S. Ct. 895. The suit involved a change in the Fair Labor Standards Act by

the agreement of an employer and an employee. The court said:

"It has been held in this and other courts that a statutory right conferred on a private party, but affecting the public interest, may not be waived or released if such waiver or release contravenes the statutory policy."

Robertson v. Alaska Juneau Gold Mining Co. (11/5/46, 9th cir.), 157 F. 2d 876. Involved Fair Labor Standards Act. Another recent expression of the courts on a public welfare statute. The court said:

"An express agreement to work for less than the basic minimum statutory rates is invalid, and a release given an employer by an employee freeing the employer from further claims under the Fair Labor Standards Act, will not estop the employee from later recovering liquidated damages for unpaid wages and overtime, and attorney's fees under the Act since the employees' rights under Sec. 16(b) of the Act, although conferred on private persons, are statutory rights which affect the public interest and, hence, rights which may not be waived by an employee. Further, acceptance by an employee of payments of regular and overtime wages will not estop him from suing to recover the amount due him when he proves he actually worked longer.

"We think the employees' right to have their regular rate of compensation (and, consequently, their overtime rates) computed according to the method laid down by the Supreme Court in Walling v. Helmerich & Payne (see note 3), is also a right of this same 'private-public character' and, hence, is also a right which cannot be waived, and which the employee cannot be estopped to assert, even though, through his union, he has forced an unwilling employer to adopt the illegal plan."

Lakos v. Saliaris (12/31/40, 4th cir.), 116 F. 2d 440. Involved a contract changing the terms in reference to the time of payment of seamen.

"Calling portion of wages received by seamen a 'war bonus' would not alter essential character thereof as 'wages' within statute entitling seamen to one-half earned 'wages' in every port. Seamen's Act 1915, Sec. 4, 46 U. S. C. A. Sec. 597."

"* * * The voyage had ended in a port in the United States. The law of this country entitled the seamen to payment of the remainder due them as wages. The vessel by entering the port became subject to that law, and no contract in contravention thereof could be given effect. Patterson v. Bark Eudora, 190 U. S. 169, 23 S. Ct. 821, 47 L. Ed. 1002."

Griffiths v. Helvering (12/18/39), 308 U. S. 355, 60 S. Ct. 277.

Involved the shifting of revenue taxes. The court said:

"* * * Legislative words are not inert, and derive vitality from the obvious purposes at which they are aimed, particularly in the provisions of a tax law like those governing installment sales in Sec. 44 of the Revenue Act of 1932. Taxes cannot be escaped 'by anticipatory arrangements and contracts however skilfully devised * * * by which the fruits are attributed to a different tree from that on which they grew.'"

III.

Contracts between professional musicians, who hold themselves out to the public for hire, as one of the contracting parties, and the person who so hires them for

such professional engagements, as the other contracting party, as a matter of law embody the provisions of the social security and unemployment statutes and the regulations adopted for their enforcement. Therefore, the provisions of such contracts naming all the musicians as employees and the engagers as their employers, are ineffective to change the professional musicians to employees.

(These cases involve the social security acts as applied to musicians.)

Nebraska Natl. Hotel Co. v. O'Malley (case at bar, 10/2/45), 63 F. Supp. 26. Opinion, R. 26; findings of fact and conclusions of law, R. 38. Form both A and B contracts construed.

Williams v. U. S., 126 F. 2d 129 (conflict with decision of 8th cir.). Form A contract construed as ineffective to create employer relationship with hotel.

Birmingham v. Bartels (9/25/46. Certiorari allowed, Nos. 731 and 732, October term 1946), 157 F. 2d 295.

Spillson v. Smith (2/7/45, 7th cir.), 147 F. 2d 727.

"The question is whether the musicians who furnished the music at the Berghoff Grill and Gardens, a restaurant operated by Berghoff Grill, Inc., in Fort Wayne, Indiana, were in its employ within the meaning of section 907 of the Act."

The court held that the engager was not the employer and entered judgment for the refund as prayed irrespective of the contract of employment.

Radio City Music Hall v. U. S. (5/3/43, 2d cir.), 135 F. 2d 715. Treasury regulations in the case at bar construed to exclude actors and entertainers as employees of the plaintiff.

IV.

In a suit for the recovery of a refund which presents to the Court the validity of a contract of employment embodying the terms of the social security and unemployment statutes, the questions of protest in the payment of the excise tax to the Collector and of duress in the execution of the contract for hire become immaterial.

Internal Revenue Code, Sec. 3772, 26 U. S. C., 53 Stat. 465, Suits for Refund:

"(3) (b) Protest or duress. Such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress."

Rothensies v. Electric Storage Battery Co. (11/27/45, 3rd cir.), 152 F. 2d 521, was reversed on 12/16/46, ... U. S. ....., 67 S. Ct. 271, but as we read the case, only on the question of recoupment of taxes that had been barred by the statute of limitations. However, the Circuit Court held as follows:

"A taxpayer does not lose his rights by fact that he pays first and disputes correctness of payment later, if he takes proper steps to preserve his claim." Citing Bull v. U. S. (1935), 295 U. S. 247, 55 S. Ct. 695. No recoupment is involved in the case at bar, and the taxpayer petitioner duly filed its application for refund with the Commissioner and the same was rejected. Suit was brought in the United States District Court within the time provided by law. These matters are not in dispute.

The citation to the statute and the citation to the incidental case are given to illustrate that a certain part of the decision in *Birmingham v. Bartels*, 157 F. 2d 295, in which certiorari has been allowed in reference to duress, was considered by the Circuit Court of Appeals for the Eighth Circuit on questions of the Form B contract here in question and the conditions surrounding its adoption. The language of the Circuit Court we set forth as follows:

> "A court of law cannot ignore a contract because of alleged unfairness in the negotiations by which the obligation has been created, unless the unfairness amounts to duress or fraud capable of avoiding the contract. Duress or fraud has not been set up here, nor has either of them been attempted to be proved. Mere inequality in economic bargaining power is not legal unfairness which will permit either party to avoid a contract or a court to ignore it. The balancing of bargaining power between economic classes is of the legislative and not the judicial domain. The fact that the ballroom operators here had objected to the provision for control, but were obliged to accept it in order to obtain the services of the orchestras, to our mind only serves to emphasize the reality of the making of the agreement."

It would seem that the United States Supreme Court should consider the language of the statute hereinabove cited in reference to duress and protest, and reverse the United States Circuit Court of Appeals on what petitioner herein believes to be an erroneous expression of the law of that case.

V.

The refusal by Congress, to adopt an amendment to the social security and unemployment statutes, that would cover musicians and their leader, should be decisive of that question when musicians seek the benefits of the act through a contract of hire defining such musicians as covered employees.

> *Wright v. Vinton Branch, et al.* (3/29/37), 300 U. S. 440, 57 S. Ct. 556, decided new questions of doubtful constitutionality of the Frazier-Lemke Act.
>
> "Since the language of the Act is not free from doubt in the particulars mentioned, we are justified in seeking enlightment from reports of Congressional committees and explanations given on the floor of the Senate and House by those in charge of the measure."

This must be conceded to be the established rule. Next, however, we come to the effect of the rejection of a proposed amendment as in the case at bar. We find authority to the effect that the law should not be construed by the courts as if the amendment had been passed rather than rejected.

U. S. v. Pfitsch, 256 U. S. 547, 41 S. Ct. 569. The Court had for decision whether or not the United States District Court had exclusive or concurrent jurisdiction with the court of claims. Concerning a proposed and rejected amendment, the Court held:

> "It is plain, then, that Congress had this question presented to its attention in a most precise form. It had the issue clearly drawn between grant-

ing for the adjudication of cases arising under this section concurrent jurisdiction in the Court of Claims and the District Courts without a trial by jury, or of establishing an exclusive jurisdiction in the District Courts of which the right to a jury trial is an incident. The first alternative was rejected, and the reason given for this rejection in the statement of the House conferees is that the proposed amendment would confer jurisdiction upon the Court of Claims. It is difficult to conceive of any rational ground for rejecting the clear and explicit amendment made by the Senate, except to accord a trial by jury."

U. S., et al. v. American Trucking Assns., Inc., et al., 310 U. S. 534, 547, 60 S. Ct. 1059, 1066. The Court, in construing the Motor Carrier Act on the question of the Commission's power to fix wages and hours, said in reference to enlightenment from an amendment:

"The clause in question was not contained in the bill as introduced. It was presented on the Senate floor as a committee amendment following a suggestion of the chairman of the Legislative Committee of the Commission, Mr. McManamy."

From the opinion is quoted preceding language as follows:

"We are especially hesitant to conclude that Congress intended to grant the Commission other than the customary power to secure safety in view of the absence in the legislative history of the act of any discussion of the desirability of giving the Commission broad powers over employees."

In the footnotes in the truckers case (29) is collected the interpretations given to the word "employee" in many different federal laws. However, in the case at bar

the Court need search no further because the proposed amendment concerning musicians hereinbefore set forth and here again copied (R. 249) provided clearly:

> "Senator King. You mean the whole bill or just this particular subject?
>
> "General Ansell. I will have to confine myself to this particular subject, the master and servant relationship. I myself wish to submit to this committee, and pray with all deference respectful consideration of it, an amendment which in my opinion simple justice requires to be placed in this act, and that amendment is this:
>
> " 'That any person who for remuneration plays instrumental music or otherwise performs in or with an orchestra or other group of musicians, including the leader thereof, shall be deemed the employee of the purchaser as such term is used in the ruling of the Commissioner of Internal Revenue dated August 31, 1937.' "

This very plain amendment having been rejected, it seems to petitioner that by applying the reasoning in the foregoing cases cited, to the rejection of the proposed amendment to include musicians in the social security and unemployment acts, the question before the Court in the case at bar is settled, i.e., that any person who performs for remuneration in or with other musicians, including the leader, is outside the purview of these acts. Hereafter a court will have completed its task of determination of an employee when it decides that a person is a musician; that he did hold himself out for hire; that he was so hired and so performed as a musician for hire, and did so for the remuneration paid.

To the same effect on aids in interpretation generally:

Apex Hosiery Co. v. Leader (5/27/40), 310 U. S. 469, 60 S. Ct. 982.

Haggar Co. v. Helvering (1/2/40), 308 U. S. 389, 60 S. Ct. 337.

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Attorneys for Petitioner.

SERVICE PAGE

The undersigned counsel for petitioner, by attaching his signature to this petition for writ of certiorari, certifies that to the best of his knowledge and belief the matters herein set forth are correct and that the petition is presented in good faith.

Dated at Omaha, Nebraska, this 18th day of January, 1947.

WILLIAM J. HOTZ,
HOTZ & HOTZ,
1530-5 City National Bank Building,
Omaha, Nebraska,
Attorneys for Petitioner.

The undersigned counsel for respondent in the above-captioned case hereby acknowledges receipt of copy of the foregoing petition for writ of certiorari and brief in support, and acknowledges as having received heretofore a copy of the transcript of the printed record, heretofore filed in the United States Circuit Court of Appeals for the Eighth Circuit, by the respondent herein as appellant in No. 13359 in that court.

Dated at Omaha, Nebraska, this 18th day of January, 1947.

.....

United States Attorney for
the District of Nebraska, Omaha,
Attorney for Respondent.

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 941

NEBRASKA NATIONAL HOTEL COMPANY, A NEBRASKA CORPORATION, PETITIONER

v.

GEORGE W. O'MALLEY, COLLECTOR OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

The facts and the principal issue in this case are substantially the same as those in *Roy Bartels, et al.* v. *E. H. Birmingham, et al.*, and *Larry V. Geer, et al.* v. *E. H. Birmingham*, Nos. 731 and 732, this term. (R. 39–44.) The primary question is whether the musicians and leaders of various established orchestras (eleven in the *Bartels* and *Geer* cases and twenty-five here (R. 27)) who engaged their services to petitioners under identical employment contracts known as "Form B" were employees of petitioners within the meaning

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of the Social Security Act and corresponding provisions of the Internal Revenue Code. In each case the same type of orchestras were engaged through similar channels and performed their services upon petitioners' premises in the same manner. (R. 39–44.)

Under such circumstances it would not appear necessary for this Court to hear another case in order to safeguard any of petitioner's rights. These rights will be fully protected by keeping the case at issue in the Circuit Court of Appeals or by this Court holding the petition for certiorari in abeyance pending final disposition of Nos. 731 and 732. If either of these procedures be adopted, petitioner should, of course, be allowed to file a brief *amicus curiae* in Nos. 731 and 732.

Petitioner in this case has also argued, and the District Court found (R. 43–44), that the musicians (the sidemen, not merely the leaders) were entertainers engaged in an independent profession, and were therefore independent contractors and not employees subject to the Social Security Act at all. This contention is inconsistent with the decision of the Eighth Circuit in Nos. 731 and 732, of the Seventh Circuit in *Williams* v. *United States,* 126 F. 2d 129 (C. C. A. 7), certiorari denied, 317 U. S. 655, and *Spillson* v. *Smith,* 147 F. 2d 727 (C. C. A. 7), and with either the holdings or the implications of many District Court decisions. *General Wayne Inn* v. *Rothensies,* 47 F. Supp. 391 (E. D. Pa.); *Biltgen*

v. *Reynolds*, 58 F. Supp. 909 (D. C. Minn.); *Aberdeen Aerie No. 24, etc.* v. *United States*, 50 F. Supp. 734, (W. D. Wash.); *Los Angeles Athletic Club* v. *United States*, 54 F. Supp. 702 (S. D. Cal.), appeal dismissed 144 F. 2d 352; *In re Ten Eyck Co.*, 41 F. Supp. 375 (N. D. N. Y.); *Longo d/b/a Biffi Night Club* v. *Glenn* (W. D. Ky.), decided November 20, 1943, Vol. 1, C. C. H. Unemployment Insurance Service § 5054.192. The point is obviously without merit. It certainly would not warrant granting a petition for certiorari in advance of review by the Circuit Court of Appeals.[1]

Respectfully submitted,

GEORGE T. WASHINGTON,
Acting Solicitor General.

FEBRUARY, 1947.

[1] If the leaders should be held to be independent contractors, the petitioner hotel company would not be liable for the Social Security taxes on the leader or the sidemen and the Court would not reach the question whether the sidemen were independent contractors on their own account. If the leader is held to be an employee of the petitioner, it is inconceivable that the sidemen would not also be employees.

U. S. GOVERNMENT PRINTING OFFICE: 1947